dealt with in another Originating Summons No 247 of 1988. He submitted that the plaintiff's application in the present case was based solely on expediency; it was in the best economic interest of both parties, as well as the safety and well-being of the neighbouring properties. The building was 80% completed, and the court should enable the plaintiff to complete it. No case authorities were cited to me, however, and no argument was advanced to me that this was a case in which there was jurisdiction to order a sale, and therefore also a case in which the court would be empowered to order the property to be further mortgaged under 18(2)(d) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('the Act').

It cannot be disputed that in a proper case, the court has jurisdiction under s 18 of the Act to order property to be charged or mortgaged, but the onus of proof is on the applicant to satisfy the court that it should exercise this jurisdiction. For this purpose, an applicant must show that there is a legal right which can and should be enforced, or that in all the circumstances the applicant is deserving of being granted such an order by way of equitable relief. In my judgment, the plaintiff has not done this, and has not discharged the onus of proof on him. In this case, even leaving aside the question of whether or not the defendant's signature on the application from was genuine or forged, the plaintiff should never have commenced construction of the building. There was no justification whatsoever for him to press on with the construction, regardless of the known opposition of the joint tenant, when the original purpose for the construction had evaporated.

It may well be that on economic considerations, the property might be worth more now with a completed building on it earning rent; but property prices fluctuate and the experience of the last two recessions has shown that developed land may not necessarily be worth more than if it had been left in its undeveloped state. A sensible solution to this problem might have been to reach agreement to sell the property, even in its unfinished state, and then to settle the account between the parties, but this is not a matter before this court. What the court has been asked to do, on these facts, is to encumber the joint property with a further mortgage of $800,000 for the benefit of one of the co-owners. For the court to order a further mortgage of the joint property in such circumstances would, in my opinion, be an improper exercise of its jurisdiction. Even for this troubled family, it would only make things worse, and further complicate an already complicated situation. Accordingly, I dismissed the application with costs.

I should add that the plaintiff has appealed to the Court of Appeal and, as a preliminary step, under s 32(2) of the Act, applied on 6 December 1989 for further argument. On the same day the plaintiff was asked by the registrar to comply with Practice Direction No 1 of 1987 paras (1) (c) to (f). The plaintiff was reminded again on 8 January 1990 that on his complying with the practice direction, consideration would be given to whether further argument would be required. To date the plaintiff has not complied with the Practice Direction.

Application dismissed.

Solicitors: *Michael Khoo & BB Ong; Low & Robert Yu.*

Reported by *Terence Tan Bian Chye*

Four Seas Communication Bank Ltd v Sim See Kee

HIGH COURT (SINGAPORE) — APPEAL IN SUIT NO 86 OF 1987
RAJAH J
22 MARCH 1989

Conflict of Laws — Proper law of the contract — Whether contract unenforceable due to a breach of the Malaysian Exchange Control Act 1953/art VIII s 2(b) of Bretton Woods Agreements Order 1966

Exchange Control — Whether contract unenforceable due to a breach of the Malaysian Exchange Control Act 1953

Words and Phrases — 'Exchange Contract'

The plaintiffs were a bank incorporated in Singapore. The defendant was a resident in Malaysia. The plaintiffs advanced moneys and extended credit facilities to the defendant in his overdraft account in the plaintiffs' bank. The overdraft account was operated in Singapore and the moneys involved were in Singapore currency. Summary judgment was obtained by the plaintiffs against the defendant for moneys advanced and credit facilities extended. The defendant was appealing against the summary judgment. The defendant argued that the loan:

(i) was unenforceable due to a breach of s 4(1) of the Exchange Control Act 1953 (Rev 1969) of Malaysia; and
(ii) a breach of art VIII s 2(b) of the Bretton Woods Agreements Order 1966.

Held, dismissing the defendant's appeal:

(1) Based on the facts, the proper law of the contract was that of Singapore. If the contract was lawful by the proper law and lawful in the place of performance, it is immaterial that the party liable to perform would by doing so violate the laws of the foreign country in which he is a resident or carries on business or of which he is a national. The result is that a borrower or lender could be committed to perform a contract even though the contract violated the laws of the country of its incorporation, eg an exchange control law, provided that there is an external proper law and the illegality does not arise where payment is to be made.

(2) The advances did not contradict art VIII s 2(b) of the Bretton Woods Agreements Order 1966 as the said Order applies to 'exchange contracts'. The term 'exchange contracts' should be

confined to contracts to exchange the currency of one country for that of another. The instant case was not of a contract to exchange the currency of one country for another. As the loan and advances on the overdraft account were made to the defendant in Singapore currency in Singapore, it was not an 'exchange contract'. The fact that the defendant was a Malaysian citizen residing in Malaysia was not pertinent to the issue of his liability to the plaintiffs.

Case referred to

1 *Bank of India* v *Transcontinental Commodity Merchants Ltd & Anor* [1986] 2 MLJ 345 (refd)

Legislation referred to

Exchange Control Act 1953 (Rev 1962) [Mal] s 4(1)
Bretton Woods Agreements Order 1966 art VIII s 2(b)

Tan Hin Tat for the plaintiffs.
Genevieve Tan Mei Wan for the defendant.

Cur Adv Vult

Rajah J: The plaintiffs, who carry on the business of banking in Singapore, claim against the defendant the sum of $452,028.69 being money advanced and credit facilities extended by the plaintiffs to the defendant in Singapore on his overdraft account and for interest thereon. Summary judgment was obtained by the plaintiffs on 10 July 1987 for the said sum of $452,028.69 together with interest thereon. The defendant appealed against the summary judgment and asked that the registrar's decision be set aside and that he be granted unconditional leave to defend.

The appeal came on for hearing before me in the usual way on 14 February 1989 when I dismissed the appeal with costs. The main thrust of the defendant was (1) that the defendant is a Malaysian citizen and was at all material times resident in Malaysia, and (2) that the loan is unenforceable due to a breach of Malaysian foreign exchange regulations and for this proposition he relied on s 4(1) of the Exchange Control Act 1953 (Rev 1969) which provides as follows:

> Except with the permission of the Controller, no person, other than an authorized dealer, shall, in Malaysia, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to any person other than an authorized dealer.

It is to be noted that this section comes under Part II of the Act which relates to dealings in gold and foreign currency.

The defendant also relied on art VIII s 2(b) of the Bretton Woods Agreements Order 1966 made under the Bretton Woods Agreements Act (Cap 27, 1985 Ed) which provides 'Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member.'

The facts of the case as may be gleaned from the affidavit of the vice-president of the plaintiff bank filed on 26 June 1987 (encl 7) are as follows:

(1) The plaintiff bank is incorporated in Singapore and carries on the business of banking in Singapore.
(2) The overdraft account was opened on Singapore.
(3) The defendant and his wife had executed the relevant mandate forms in Singapore.
(4) The account was in a Singapore bank and was operated in Singapore.
(5) The cheques issued by the defendant were drawn on the bank in Singapore.
(6) The moneys involved were in Singapore currency.

From these facts it is clear that the proper law of the contract is not that of Malaysia but that of Singapore.

The law in this matter is clear. Paragraph 5 of *Encyclopaedia of Banking Law* Vol 2 1124 states:

> It should further be noted that if the contract is lawful by the proper law and lawful at the place of performance, then it is immaterial that the party liable to perform would by doing so violate the laws of the foreign country in which he is resident or carries on business or of which he is a national. The result is that a borrower or lender could be committed to perform a contract even though performance of the contract violated the laws of the country of its incorporation, eg an exchange control law, provided that there is an external proper law and the illegality does not arise where payments have to be made.

The defendant's argument that the advances under the banking facilities provided for by the plaintiffs to the defendant contravened art VIII s 2(b) of the Bretton Woods Agreements Order is misconceived as the said Order merely applies to 'exchange contracts' and should be confined to contracts to exchange the currency of one country for that of another.

In the case of *Bank of India* v *Transcontinental Commodity Merchants Ltd & Anor*[1] at p 345 para 3, Wahab Ghows J had this to say:

> It is clear from the authorities cited that the term 'exchange contracts' in s 2(b) of art VIII of the Bretton Woods Agreements should be interpreted narrowly and should be confined to contracts to exchange the currency of one country for that of another.

In the instant case there is no question of a contract to exchange the currency of one country for another. Here the loan and advances on the overdraft account were made to the defendant in Singapore currency in Singapore. The fact that the defendant was a Malaysian citizen residing in Malaysia is not pertinent to the issue of his liability to the bank. I therefore dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Sim Hill Tan & Wong*; *Allen & Gledhill*.

Reported by *Teoh Ai Lin*